IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 13TH NOVEMBER 2007 / 22ND KARTHIKA 1929

Bail Appl..No. 6439 of 2007()

CRIME NO.95/07 OF BADIYADUKA POLICE STATION
CP.261/2007 of J.M.F.C.,KASARAGOD

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PETITIONER/2ND ACCUSED:-

UMMER S/O/ IBRAHIM, NEAR KOPALA SOUNDS,
BATHIYODE, MANGALAPADI, KASARGOD.

BY ADV. SRI.E.R.VENKATESWARAN
SRI.R.SREEHARI

RESPONDENTS: RESPONDENT/COMPLAINT:-

STATE OF KERALA, REPRESENTED BY
THE SUB INSPECTOR OF POLICE, BADIYADUKA
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI. JAI GEORGE

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 13/11/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

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B.A.No. 6439 of 2007

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Dated this the 13th day of November, 2007

O R D E R

Application for anticipatory bail. Petitioner is the second accused and he, along with the co-accused(A1), faces allegations under the Kerala Abkari Act. 2500 packets of Karnataka arrack, each containing 100 ml., were allegedly seized by the police. The first accused was arrested at the spot. The second accused ran away from the scene. He could not be arrested. Investigation was completed. Final report was filed. Cognizance was taken by the learned Magistrate. Committal proceedings was registered. Warrant of arrest has been issued against the petitioner. It is at that stage that the petitioner has come before this Court with a prayer that directions under Section 438 Cr.P.C. may be issued in favour of the petitioner.

2. There has been subsequent developments also. An application under Section 173(8) Cr.P.C. was filed before the learned Magistrate. Further investigation was permitted. Further investigation has been conducted. As per interim direction

dt.31.10.2007 passed by this Court, the petitioner was directed to appear before the Investigating Officer. He had appeared. Further investigation has been conducted also. According to the prosecution, it is now confirmed by them that the petitioner has been properly identified as the one who has been ran away from the scene.

3. The learned Prosecutor, in these circumstances, opposes the application for anticipatory bail. He submits that it is for the petitioner now to appear before the learned Magistrate in the pending committal proceedings and seek regular bail. There is absolutely no justification in the prayer for grant of anticipatory bail to the petitioner. He may be directed to resort to the ordinary and normal procedure of appearing before the Investigating Officer or the learned Magistrate and then seek regular bail.

4. I have considered all the relevant inputs. I am unable to find any features in this case, which would justify the invocation of the extra ordinary equitable discretion under Section 438 Cr.P.C. in favour of the petitioner. I agree with the learned Prosecutor that this is a fit case where the petitioner must resort to the ordinary and normal

procedure of appearing before the Investigator or the learned Magistrate having jurisdiction and then seek regular bail in the ordinary course.

5. It is trite after the decision in **Bharat Chaudhary** v. **State of Bihar** (AIR 2003 SC 4662) that powers under Section 438 Cr.P.C. can be invoked even in favour of a petitioner, who apprehends arrest in the pending case on the strength of a non-bailable warrant issued by the court. Even that is not by itself sufficient to justify the invocation of the jurisdiction under Section 438 Cr.P.C. I am unable to find any compelling reasons which would justify invocation of the jurisdiction under Section 438 Cr.P.C.

6. It is certainly for the petitioner to appear before the learned Magistrate and explain to the learned Magistrate the circumstances under which he could not earlier appear before the learned Magistrate. I have no reason to assume that the learned Magistrate would not consider the application for bail to be filed by the petitioner when he surrenders before the learned Magistrate, on merits, in accordance with law and expeditiously. Every court must do the same. No special or

specific direction appears to be necessary. Sufficient general directions have already been issued by this Court in the decision in **Alice George** v. **Dy.S.P. of Police** (2003 (1) KLT 339).

7. This application is accordingly dismissed. I may however hasten to observe that if the petitioner appears before the learned Magistrate in the committal proceedings and applies for regular bail after giving sufficient prior notice to the Prosecutor in charge of the case, the learned Magistrate must proceed to pass orders on merits, in accordance with law and expeditiously - on the date of surrender itself. Needless to say the learned Magistrate must consider the application in the light of the decision in **Sukumari** v. **State of Kerala** (2001 (1) KLT 22).

(R. BASANT)
Judge

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R. BASANT, J.

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B.A.No. 6439 of 2007

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Dated this the 31st day of October, 2007

O R D E R

The petitioner is the second accused in a crime registered under the Kerala Abkari Act. The first accused was allegedly intercepted when he was transporting 2500 packets of liquor each containing 100 ml. The petitioner, who was allegedly present along with the first accused, took to his heels and could not be apprehended. His details were ascertained from the first accused. Investigation was complete and final report was filed even before the petitioner was arrested.

2. According to the petitioner, in the earliest documents, the accused is referred to as Ummer of Uppala. The petitioner is not Ummer of Uppala, but Ummer of Mangalapadi. He has been wrongly and unnecessarily arrayed as an accused and cognizance has been taken by the learned Magistrate. The petitioner apprehends that eventhough he is not really the accused, who, according to the prosecution, had run away from the scene of the crime, he is being proceeded with

unnecessarily. It is, in these circumstances, that the petitioner has come to this Court with this application for anticipatory bail.

3. The learned Prosecutor, after taking instructions, submits that it is true that the final report was filed. But subsequently an application has been filed for permission to conduct further investigation and after obtaining permission further investigation under Section 173(8) Cr.P.C. is now being conducted. All materials collected so far indicate that the petitioner is the one who had run away from the scene at the time of detection. The petitioner has to be interrogated. The learned Prosecutor submits that interim directions may be issued to the petitioner to make himself available for interrogation before the Investigating Officer, subject to appropriate terms and conditions.

4. I am satisfied that interim directions can be issued. There shall be a direction to the petitioner to appear before the Investigating Officer between 10 a.m. and 3 p.m. on 6.11.2007 and 7.11.2007.

5. The learned Prosecutor undertakes and the said undertaking is accepted that the petitioner shall not be arrested till the next date of posting. Call on 13.11.2007.

(R. BASANT)
tm Judge